DEPARTMENT OF STATE REVENUE

04-20120009.LOF

Letter of Findings Number: 04-20120009
Sales and Use Tax
For Tax Years 2008, 2009, and 2010

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ISSUE

I. Sales and Use Tax – Public Transportation Exemption.

Authority: IC § 6-2.5-1-1 et seq.; IC § 6-2.5-3-4; IC § 6-2.5-5-27; IC § 6-8.1-5-1; 45 IAC 2.2-5-61; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Panhandle Eastern Pipeline Co. v. Indiana Dep't. of State Revenue, 741 N.E.2d 816 (Ind. Tax Ct. 2001); Carnahan Grain, Inc. v. Indiana Dep't of State Revenue, 828 N.E.2d 465 (Ind. Tax Ct. 2005); Sales Tax Information Bulletin 12 (Sept 2009).

Taxpayer protests the assessments of use tax on various purchases of tangible personal property.

STATEMENT OF FACTS

Taxpayer, an Indiana S corporation, is a petroleum products distributor. Taxpayer purchases motor fuel, diesel fuel, heating oil, and lubricants. Taxpayer also sells gasoline equipment. Pursuant to an audit, the Indiana Department of Revenue (Department) determined that Taxpayer owed additional use tax for the 2008, 2009, and 2010 tax years. The Department found that Taxpayer had made a variety of purchases of tangible personal property, including parts for trucks and motor fuel, without paying the state gross retail tax (sales tax) at the time of the purchases or remitting use tax to the Department. Taxpayer protests the assessments of use tax on certain of the purchases claiming that it was eligible for the public transportation exemption. A hearing was held, and, this Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales and Use Tax – Public Transportation Exemption.

DISCUSSION

Taxpayer asserts that certain of its purchases are not subject to use tax because the purchases qualify for the public transportation exemption.

All tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes a sales tax on retail transactions and a complementary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-1-1 et seq. In general, all purchases of tangible personal property are subject to sales and/or use tax. An exemption from use tax is granted for transactions where sales tax was paid at the time of the purchase pursuant to IC § 6-2.5-3-4. Additionally, in certain circumstances, exemptions from sales and/or use tax are available, for example, a public transportation exemption under IC § 6-2.5-5-27.

IC § 6-2.5-5-27 states:

> Transactions involving tangible personal property and services are exempt from the state gross retail tax, if the person acquiring the property or service directly uses or consumes it in providing public transportation for persons or property.

In Panhandle Eastern Pipeline Co. v. Indiana Dep't. of State Revenue, 741 N.E.2d 816 (Ind. Tax Ct. 2001), the court addressed the issue whether a taxpayer qualifies for the public transportation exemption. The court stated:

> The public transportation exemption provided by section 6-2.5-5-27 is an all-or-nothing exemption. If a taxpayer acquires tangible personal property for predominate use in providing public transportation for third parties, then it is entitled to the exemption. If a taxpayer is not predominately engaged in transporting the property of another, it is not entitled to the exemption.
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> Id. at 819.

Four years later, in Carnahan Grain, Inc. v. Indiana Dep't of State Revenue, 828 N.E.2d 465 (Ind. Tax Ct. 2005), the court further explained the proper application of Panhandle Eastern Pipeline, as follows:

> If [] the property is used predominantly for third-party public transportation, then the taxpayer is entitled to the exemption. Conversely, if the property is not predominantly used for third-party public transportation (i.e., it is predominantly used to transport the taxpayer's own property), then the taxpayer is not entitled to the exemption.
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> Id. at 468.

Accordingly, the public transportation exemption applies to a taxpayer only when the taxpayer shows that the equipment purchased was predominantly used to transport the property of another for which the taxpayer received consideration.

Additionally, 45 IAC 2.2-5-61, in relevant part, further elaborates on the public transportation exemption:

(a) The state gross retail tax shall not apply to the sale and storage or use in this state of tangible personal property which is directly used in the rendering of public transportation of persons or property.

(b) Definition: Public Transportation. Public transportation shall mean and include the movement, transportation, or carrying of persons and/or property for consideration by a common carrier, contract carrier, household goods carrier, carriers of exempt commodities, and other specialized carriers performing public transportation service for compensation by highway, rail, air, or water, which carriers operate under authority issued by, or are specifically exempt by statute or regulation from economic regulation of, the public service commission of Indiana, the Interstate Commerce Commission, the aeronautics commission of Indiana, the U.S. Civil Aeronautics Board, the U.S. Department of Transportation, or the Federal Maritime Commissioner; however, the fact that a company possesses a permit or authority issued by the P.S.C.I., I.C.C., etc., does not of itself mean that such a company is engaged in public transportation unless it is in fact engaged in the transportation of persons or property for consideration as defined above.

(c) In order to qualify for exemption, the tangible personal property must be reasonably necessary to the rendering of public transportation. The tangible personal property must be indispensable and essential in directly transporting persons or property.

Sales Tax Information Bulletin 12 (Sept 2009), 20091028 Ind. Reg. 045090847NRA, in pertinent part, also states:

I. Public Transportation Definition

"Public transportation" means the movement, transportation or carrying of persons and/or property for consideration by a common carrier, contract carrier, household goods carrier, carriers of exempt commodities and other specialized carriers performing public transportation service for compensation by highway, rail, air or water, which carriers operate under authority issued by, or are specifically exempt by statute or regulation from economic regulation of, the appropriate federal or state regulatory authority.

Even if a person or company operates under the appropriate authority, they also must transport people or property for consideration. That is to say, a public transportation provider must be compensated for transporting people or goods. The goods transported must be goods owned by someone other than the public transportation provider. To qualify for the exemption, the tangible personal property purchased must be predominately used in providing public transportation. The tangible personal property is predominately used in public transportation if more than 50[percent] of its use is attributable to transporting people or property for hire.

Taxpayer asserts that it was entitled to the public transportation exemption for the property purchased for two of its semi trailers that were predominantly used to transport fuel that it did not own. Taxpayer maintains that while the semi trailers are used to transport its own fuel from the rack to its bulk storage facilities part of the time, a majority of the time it uses the semi trailers to transport fuel that it does not own. Taxpayer states that a majority of its customers hire Taxpayer to deliver fuel that the customers have purchased directly from the rack to their location. Taxpayer charges these transportation customers a fee based upon the weight of the haul and number of miles the haul is driven.

During the course of the protest, Taxpayer submitted additional documentation–including transportation invoices, bills of lading, and a summary of the mileage for the two semi trailers–to support its protest. While Taxpayer uses these two semi trailers to deliver fuel it owns from the rack to its bulk storage facilities, Taxpayer's documentation reflects that this accounts for less than forty percent of the semi trailers' mileage. Thus, the documentation presented demonstrates that over sixty percent of the mileage for these two semi trailers resulted from transporting property owned by another for which Taxpayer was compensated. Therefore, Taxpayer has provided sufficient documentation to establish that Taxpayer was using these two semi trailers over fifty percent of the time–i.e. predominantly–to transport property owned by someone other than Taxpayer for consideration.

FINDING

Taxpayer's protest to the imposition of use tax on the property relating to the two semi trailers is sustained.

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